



FAIR POLITICAL PRACTICES COMMISSION

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**Re: Your Request for Advice
Our File No. A-00-034**

Dear Mr. Lucas:

This letter is in response to your request for advice on behalf of former state administrative official Glenn Bystrom regarding the post-governmental employment restrictions of the Political Reform Act (the "Act").¹ Mr. Bystrom was the Deputy Director, Sales and Tax Use Department, of the Board of Equalization. Please be advised that we can only advise prospectively and we cannot render any advice relating to past conduct. (Regulation 18329(b)(8)(A).)

QUESTIONS

1. Is Mr. Bystrom permanently banned from making any appearance or communication in connection with the approximately 20,000 audit matters that were commenced each year during his tenure as Deputy Director?
2. Is Mr. Bystrom permanently banned from making any appearance or communication in connection with the approximately 1,800 petitions for redetermination filed with the Board of Equalization's legal division each year that were resolved through the legal division appeal conference process concerning audits that were commenced during his tenure?
3. Is Mr. Bystrom permanently banned from making any appearance or communication in connection with any audit appeal petition that was pending for hearing before the five elected members of the Board of Equalization during his tenure as the Deputy Director?

CONCLUSIONS

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

1. The permanent ban applies to the 20,000 audits commenced each year during his tenure. As the Deputy Director of the Sales and Use Tax Department, Mr. Bystrom is deemed to have participated in any audit pending during his tenure. All audits were considered under his supervisory authority, since he was at the head of the chain of command for the Sales and Use Tax Department.

2. The permanent ban applies to the audit appeal conferences conducted by the legal division. Mr. Bystrom is deemed to have participated in the audits that were annually performed by the Board of Equalization and that were commenced during his tenure. We consider the audit appeal, which results from the taxpayer's petition for redetermination of an audit, part of the same proceeding. Therefore, the permanent ban applies to the audit appeal conferences resulting from any audit commenced during his tenure or to any audit appeal pending before the legal division during his tenure.

3. The permanent ban applies to any audit appeal petition that was pending for hearing before the five-member Board of Equalization during Mr. Bystrom's tenure as Deputy Director. The ban also applies to any audit appeal hearing resulting from audits and audit appeal conferences commenced during his tenure. The audit appeal hearing before the BOE is also considered part of the same proceeding, starting with the initial audit.

FACTS

The Position of Deputy Director, Sales and Use Tax Department.

Glenn Bystrom formerly held the position of Deputy Director, Sales and Use Tax Department at the Board of Equalization ("BOE"). As the Deputy Director, Mr. Bystrom was the highest ranking employee in the department and was responsible for administering a portion of the Sales and Use Tax law. After 31 years of state service, Mr. Bystrom retired from the BOE on January 16, 1998,² and joined the accounting firm of Ernst & Young LLP ("E&Y"). At E&Y, Mr. Bystrom represents various taxpayers on a wide range of tax issues.

The BOE administrative manual provides the following "functional statement" for the Deputy Director of the Sales and Use Tax Department:

"Under the general direction of the Executive Director, the Deputy Director, Sales and Use Tax, plans, organizes, and directs the agency's sales and use tax programs. Provides guidance and assistance to the Board, the Executive Director, heads of organizational components, and other state agencies.

Specific duties of this position are:

² We note that the one-year ban is no longer applicable to Mr. Bystrom. (Section 87406.)

1. Consult with and advise the Executive Director on the administration of sales and use tax programs.
2. Represent the Executive Director on sales and use tax matters at hearings, meetings and conferences and before legislative bodies.
3. Direct the development, interpretation, and application of policies, programs, and procedures and direct the administration of the sales and use tax throughout the state.
4. Recommend changes in the application and interpretation of statutes pertaining to the sales and use tax.
5. Review and recommend for approval sales and use tax budgets for headquarters and field offices.”

There are approximately 2,350 employees in the Sales and Use Tax Department. Generally speaking, the Sales and Use Tax Department performs several functions, including: (i) registration of sales and use taxpayers; (ii) collection of taxes from sales and use taxpayers; (iii) information services relating to sales and use taxes; (iv) implementation of new legislation relating to sales and use taxes; and (v) performance of audits of sales and use taxpayers.

The Sales and Use Tax Department performs these functions through its three divisions: (i) the Headquarters Operations Division (administered by the Headquarters Operations Manager); (ii) the Field Operations Division (administered by the Chief of Field Operations); and (iii) the Program Planning Division (administered by the Program Planning Manager). Each division is administered by a division chief who is a direct subordinate of the Deputy Director.

The Field Operations Division.

The Field Operations Division is the largest division of the Sales and Use Tax Department. The BOE administrative manual describes the organization and functions of the Field Operations Division as follows:

“Under the general direction of the Deputy Director, Sales and Use Tax Department, the Field Operations Division plans, organizes, directs, and controls all administrative activities and sales and use tax program functions of the field offices throughout the State, as well as offices in New York, Chicago, and Houston. The division formulates, plans, and recommends for approval policies, programs, and procedures relating to the overall operation of the field offices, and reviews and evaluates program effectiveness and operational efficiency. The division also manages and directs the program activities of the department’s

Special Investigations Section and Centralized Collection Section.

Specific duties of this division are:

1. Plan, organize, direct, control and evaluate all the activities and tax program functions of the district offices, such as registration, enforcement, advisory services, auditing and collection of delinquent taxes. Plan, develop, and implement strategies for effective and efficient administration of the tax programs. Provide guidance to and oversee and evaluate the activities of the district administrators.
2. Plan, organize, direct and control all administrative and program activities of the Special Investigations Section, including the investigative compliance and audit functions and fraud prosecutions.
3. Conduct complete compliance duties including collections on out-of-state sales and use tax accounts and tax collections on Consumer Use Tax accounts. Also performs external agency information searches for district offices and departments other than the Sales and Use Tax Department, within the Board of Equalization.
4. Provide advice, expertise and assistance to the Board Members' offices, Executive Director, Deputy Director and Board of Equalization (BOE) management staff on tax issues and statewide program policies and procedures.
5. Provide support for regulatory and legislative changes to improve program effectiveness, the administration of various tax programs and the application of business tax laws. Advise the BOE on the public issues or problem areas in the tax laws and recommend legislative remedies or alternate solutions. Identify and provide analysis on legislative bills that adversely impact tax programs and recommend solutions or alternatives. Meet with representatives of interest groups and provide testimony at legislative committee hearings.
6. Review and approve, modify or make recommendations for budgetary, personnel and organizational changes involving field operations, including the size, location or type of field office.
7. Participate on committees or joint effort with other states and multi-governmental agencies to influence federal legislation that would have an impact on California's sales and use tax programs. Represent the BOE on tax issues at nationally recognized tax associations.
8. Act for the Deputy Director as directed and represent the BOE in meetings and conferences."

The Audit Process and Supervision.

One of the many functions of the Field Operations Division is to perform audits of selected sales and use taxpayers. The division has approximately 650 tax auditors, located in 40-50 offices throughout California and in other states, who perform such audits. Of the approximately one million registered sales and use taxpayers, the Field Operations Division commences audits of approximately 20,000 taxpayers each year.

The supervisory chain of command for the division's audit function is as follows: Generally speaking, approximately 8-10 auditors are directly supervised by an Audit Supervisor. The Audit Supervisor is supervised by a District Principal Auditor. Some of the larger offices have branch offices, in which case there exists an additional level of audit supervision between the Audit Supervisor and the District Principal Auditor. The District Principal Auditor, the senior most audit supervisor, reports to the District Administrator. The BOE has approximately 18 District Administrators, each of whom reports to the Chief of Field Operations. The Chief of Field Operations reports to the Deputy Director, Sales and Use Tax Department.

During our telephone conversation on February 29, 2000, Mr. Bystrom informed me that an audit can stop at the level of auditor, Audit Supervisor or District Principal Auditor. On some occasions, the District Administrator may be involved. Mr. Bystrom stated that he was not routinely contacted by either the District Principal Auditors or the District Administrators regarding the audits. Furthermore, he never received an audit status report listing individual audits in progress. Mr. Bystrom only received a quarterly report from the BOE that listed the gross amount of audit production figures. This is an aggregate report based on the information sent to the BOE from each district.

As Deputy Director, Mr. Bystrom had no direct role,³ supervisory or otherwise, in this audit process. Although the broad job responsibilities of the Deputy Director do include

administrative oversight of the audit program, the position did not involve reviewing any specific individual audit or audit decision, or otherwise supervising the audits.⁴

Audit Appeal Conference Process.

Following completion of an audit, a notice of determination is issued to the audited taxpayer. In the event that a taxpayer is in disagreement with the audit determination, the

³ According to your facts, only in extremely rare cases would Mr. Bystrom have any participation in a specific audit.

⁴ According to your facts, Mr. Bystrom did render advice, guidance and/or policy that applied generally to all employees of the department, including BOE auditors, or to all taxpayers or all members of a specific class of taxpayers throughout the state.

taxpayer is permitted to file a "petition for redetermination." Of the 20,000 audits performed each year, approximately 2,000 taxpayers file petitions for redetermination.

Taxpayers filing such a petition then enter the BOE's "appeal process." The appeal process is conducted by the BOE's legal division. An Assistant Chief Counsel in the legal division is in charge of the appeals. That individual reports to the Chief Counsel, who in turn reports to the Executive Director. The legal division falls completely outside of the Sales and Use Tax Department.

In order to resolve a petition for redetermination, the legal division holds an appeal conference. Generally speaking, the legal division resolves approximately 90 percent of the petitions for redetermination through the appeal conference process. As Deputy Director, Mr. Bystrom had no role in the legal division's appeal conferences and, in fact, never attended such a conference involving any taxpayer. However, according to the facts provided during our telephone conversation on March 8, 2000, there is interaction between the legal division attorney handling the appeal conference and the auditor who initially did the audit. The auditor may review the audit for the legal division attorney and is generally involved in the appeal conference.

The BOE Audit Appeal Hearings.

The approximately 200 audit matters, or ten percent of the appeal petitions, per year that are not fully resolved through the legal division's appeal conference process are then referred to the five elected BOE members for their hearing and decision. The BOE audit appeal hearings are held once or twice a month as part of the BOE's public meetings. At such hearings, the legal division presents their findings and arguments with respect to the particular audit, which is followed by the taxpayer's presentation of his/her position. Most of these matters are resolved within 30 days of the BOE hearing the matter.

Although the Deputy Director has no involvement at either the initial audit stage or the appeal conferences held before the legal division, the Deputy Director may be called on by the five members of the BOE to appear before them at a BOE audit appeal hearing to answer any administrative questions that the BOE members might have in relation to the appeal hearing.

ANALYSIS

Summary of the Applicable Law.

The Act's post-governmental employment restrictions limit the types of contacts a former employee may have with his or her former agency. Under one of the restrictions, a former state administrative official is permanently banned from "switching sides" in certain proceedings in which he or she participated. The ban applies only to proceedings that commenced *before* the former state administrative official left state service. (*Sweeney* Advice Letter, No. A-98-022.) Specifically, Section 87401 provides that:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

- (a) The State of California is a party or has a direct and substantial interest.
- (b) The proceeding is one in which the former state administrative official participated.”

A related restriction, Section 87402, further provides:

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.”

Sections 87401 and 87402 prohibit former state administrative officials, who participated in a judicial, quasi-judicial or other proceeding while employed by a state agency, from being paid to represent or assist in representing another person regarding that same proceeding. As the Deputy Director of the Sales and Use Tax Department of the BOE, Mr. Bystrom was a state administrative official. (Section 87400(b).) Therefore, he is permanently banned from “switching sides” in certain proceedings in which he participated as Deputy Director.

A “judicial, quasi-judicial or other proceeding” includes, “any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency” (Section 87400(c).) An audit is a judicial, quasi-judicial or other proceeding to which the State of California is a party or has a direct and substantial interest. (*Costa Advice Letter, No. A-98-003.*)

An official is considered to have “participated” in a proceeding, if the official was personally and substantially involved in the proceeding. Section 87400(d) defines “participated” as:

“[T]o have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding

approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.”

Regulation 18741.1(a),⁵ copy enclosed, interprets the permanent ban and provides in pertinent part:

“(4) The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision, as defined in 2 Cal. Code Regs. Sections 18702.1 - 18702.4, but excluding any proceeding involving the rendering of a legal advisory opinion not involving a specific party or parties. Any supervisor is *deemed to have participated* in any proceeding which was “pending before,” as defined in 2 Cal. Code Regs. Section 18438.2, subdivision (b), the official’s agency and which was *under his or her supervisory authority.*” (Emphasis added.)

The issue raised by your request is whether Mr. Bystrom participated in certain audit proceedings that were pending before the BOE during his tenure.

Question 1: Annual Audits.

Approximately 20,000 annual audits are commenced each year by 650 auditors in the Field Operations Division. You stated that Mr. Bystrom did not take a personal or substantial part in these audits and that he did not directly supervise the audits. However, Mr. Bystrom is at the head of the chain of command, which goes from Auditor to Auditor Supervisor to District Principal Auditor to the District Administrators to the Chief of Field Operations, who reports to the Deputy Director.

Under Regulation 18741.1(a)(4), Mr. Bystrom is deemed to have participated in a proceeding if: 1) the proceeding was pending before the agency during his tenure; and 2) any decision regarding the proceeding was made directly by Mr. Bystrom or by someone under his supervisory authority. By “pending,” the employees of the agency are required to make a decision and the decision is not purely ministerial. (Regulation 18438.2(b).) Therefore, the permanent ban covers any proceeding in which he personally participated while Deputy Director, as well as any proceeding which he supervised. (*Sweeney* Advice Letter, No. A-98-022; *Brown* Advice Letter, No. A-91-033; *Ferber* Advice Letter, No. I-99-104.)

⁵ This regulation was adopted in February of 1999 and codifies previous Commission advice, including the *Brown* Advice Letter, No. A-91-033.

Since 1985, the Commission has not distinguished between one or several supervisory layers. This is a bright line rule that the Commission reexamined and approved in the *Brown* Advice Letter, *supra*, and adopted in Regulation 18741.1 in 1999. The permanent ban covers any proceeding in which the official actually participated as well as any proceeding that he/she supervised or was handled by agency staff during his/her tenure. (*Brown, supra.*)

Mr. Bystrom is considered to have "supervised" a proceeding if he was in the supervisory chain of command for the person or persons handling the proceeding, even if he otherwise had no substantive input into the handling of the matter. As Deputy Director, Mr. Bystrom was at the top of the chain of command of his department, with only the Executive Director above him.

Accordingly, Mr. Bystrom is deemed to have participated in the 20,000 audits that were annually performed by the BOE and he may not represent a client in an audit matter that was pending at the BOE during his tenure. The permanent ban applies to any proceeding that began during Mr. Bystrom's tenure at the BOE. (*Ordos* Advice Letter, No. A-95-052.) However, the permanent ban does not prohibit an official from representing a client in any *new* proceeding even though the client may have been a party to a previous proceeding in which the official participated.

Question 2: Audit Appeal Conferences Held Before the Legal Division.

The legal division is responsible for the audit appeal process. A taxpayer may file a petition for redetermination of an audit, which is generally resolved through the appeal conference process. An Assistant Chief Counsel is in charge of the audit appeals. That individual reports to the Chief Counsel, who in turn reports to the Executive Director.

Your facts indicate that the legal division is not part of the Sales and Use Tax Department and that Mr. Bystrom was neither involved in the legal division appeal conferences nor did he ever attend any of the conferences. However, there is interaction between the legal division attorney handling the appeal conference and the auditor who initially did the audit. The auditor may review the audit for the legal division attorney and is generally involved in the appeal conference. In essence, the legal division is defending the determination of the audit division.

As discussed above, Mr. Bystrom is deemed to have participated in the audits that were annually performed by the BOE and commenced during his tenure at the BOE. In addition, he is deemed to have participated in any audit appeal commenced during his tenure in which auditors in his division participated in more than a ministerial manner.

We consider the audit appeal, which results from the taxpayer's petition for redetermination of an audit, part of the "same proceeding." The Commission has interpreted "proceeding" in connection with Coastal Commission permit applications to refer to a specific permit application, including all of the procedural stages involved in the application. (*Augusta* Advice Letter, No. I-88-449.) We advised a district principal auditor that any proceeding that began during his tenure was subject to the permanent ban; this included an appeal or specific audit determination. (*Costa* Advice Letter, No. A-98-003.) We only regard as "new" a

proceeding involving different parties or different factual or legal issues from those considered in previous proceedings. (*Grimm* Advice Letter, No. A-99-086.)

Therefore, the permanent ban applies to the audit appeal conferences that were pending before the legal division during Mr. Bystrom's tenure and to any audit appeal conferences that result from the audits performed during his tenure.

Question 3: Audit Appeals before the Five-Member BOE.

The facts state that Mr. Bystrom was required, on a regular basis, to attend the appeal hearings. He reviewed and was briefed on each matter for appeal since he often had to respond to BOE member requests and inquiries concerning specific audit appeal hearings. The audit appeals before the board would also be considered the same proceeding. Since Mr. Bystrom personally and substantially took part in these hearings, he "participated" as defined in Section 87400(d).

Therefore, the permanent ban applies to any audit appeal hearing that was pending before the five-member BOE during his employment as Deputy Director of the BOE and to any audit appeal hearing resulting from audits and audit appeals commenced during his tenure.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
Assistant General Counsel

By: 
Jill Stecher
Staff Counsel, Legal Division

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Enclosures